JUST AND REASONABLE RATES AND CHARGES FOR POLE ATTACHMENTS: THE UTILITY PERSPECTIVE

A POSITION PAPER PRESENTED BY:

AMERICAN ELECTRIC POWER SERVICE CORP.
COMMONWEALTH EDISON COMPANY
DUKE POWER COMPANY
ENTERGY SERVICES, INC.
FLORIDA POWER & LIGHT COMPANY
NORTHERN STATES POWER COMPANY
THE SOUTHERN COMPANY
WASHINGTON WATER POWER COMPANY

Prepared By:

Shirley S. Fujimoto
Christine M. Gill
Kris Anne Monteith

MCDERMOTT, WILL & EMERY
1850 K Street, N.W.
5th Floor
Washington, D.C. 20006
(202) 778-8282

August 28, 1996

JUST AND REASONABLE RATES AND CHARGES FOR POLE ATTACHMENTS: THE UTILITY PERSPECTIVE

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Telecommunications Act of 1996 added several new provisions to the Pole Attachments Act, including a revised pole attachment rate scheme. The positions offered in this position paper address rate and related-issues that several electric utilities believe must be addressed in the context of the upcoming rulemaking proceeding to implement the new rate-related provisions.

First, the Infrastructure Owners urge the Federal Communications Commission to follow the underlying policy themes of the 1996 Act -- deregulation and competition. In that vein, the Infrastructure Owners submit that voluntarily negotiated pole attachment agreements, including pole attachment rates, should be the prevailing practice in the industry, not the exception.

Second, any rate methodology established by the Commission should be based on market values or replacement costs, not the historical or embedded costs used in the current FCC-rate formula. To the extent the FCC adopts a rate formula identical or similar to its present formula, that rate formula must continue to permit the use of reasonable presumptions regarding pole height, the number of parties per pole, the amount of usable and other than usable space, and so forth. Unless pole owners are allowed to adopt such reasonable assumptions, a costly database must be established to collect and maintain information not currently available. That database will result in additional upfront costs to telecommunications carriers and cable operators seeking to attach to utility's poles, with no ultimate benefit to the subscribers of their services.

Third, various components of the current rate formula must be examined and revised to reflect the current usages and practices in the industry. For example, revisions are needed in the calculation for the net cost of a bare pole and the certain elements of the carrying charges components.

Fourth, the Infrastructure Owners encourage the Commission to address other just, reasonable and nondiscriminatory terms of pole attachments as its considers rate issues. For safety and reliability reasons, permitting and preapproval of attachments -- before the attachments actually occur -- is essential. Similarly, a nationwide, standardized program for the identification of the facilities of telecommunications providers and cable operators must be adopted because visual identification of their multiple facilities is difficult, if not virtually impossible. Without an identification program, the ability to contact parties with attachments during emergency situations is greatly compromised, thereby threatening the public safety. In addition, the overlashing of cable, as an alternative to setting taller poles, should be considered but under defined circumstances. Overlashing can pose particular safety problems, as

well as practical problems involving usable and other than usable space and the applicable pole attachment rate.

Finally, the Commission should allow deregulation and competition principles to guide its consideration of the just, reasonable and nondiscriminatory rates for access to ducts, conduits, rights-of-way and transmission facilities. The Infrastructure Owners submit that market forces, as well as safety, reliability and engineering concerns, should govern. To the extent the Commission determines to adopt a rate formula for ducts, conduits, rights-of-way and transmission facilities, the Infrastructure Owners urge the Commission to first carefully study the numerous, complex issues involved. These types of facilities are different from distribution poles is significant respects; the formula used in that context cannot be applied here. Moreover, ducts, conduits, rights-of-way and transmission facilities involve heightened safety concerns, as the Commission has already recognized.

The Infrastructure Owners believe that the recommendations presented in this position statement are consistent with the overall deregulation and pro-competition themes of the 1996 Act and they urge the Commission to adopt regulations, where necessary, consistent with their proposals.

JUST AND REASONABLE RATES AND CHARGES FOR POLE ATTACHMENTS: THE UTILITY PERSPECTIVE

I. INTRODUCTION

American Electric Power Service Corp., Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power & Light Company, Northern States Power Company, The Southern Company, and Washington Water Power Company (referred to collectively as the "Infrastructure Owners") present this position paper to the Federal Communications Commission in anticipation of the Commission's upcoming rulemaking to implement the rate provisions applicable to distribution poles pursuant to the Pole Attachments Act, Section 224 of the Communications Act of 1934[1/] ("the Pole Attachments Act"), as amended by the Telecommunications Act of 1996[2/] ("the 1996 Act"). Section 224(e) requires the Commission to promulgate regulations to govern the charges for pole attachments used by telecommunications carriers, when the parties fail to resolve a dispute over such charges. The FCC's regulations must ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.[3/]

The Infrastructure Owners are investor-owned electric or power utilities (or parents, subsidiaries or affiliates of electric or power utilities) engaged in the generation, transmission, distribution, and sale of electric energy.[4/] Collectively, their service territories span multiple regions of the United States and together they provide electric service to millions of residential and business customers. The Infrastructure Owners own electric energy distribution systems that include millions of distribution poles, thousands of miles of conduits, ducts and rights-of-way, all of which is used to provide electric power service to their customers. Portions of this infrastructure, particularly distribution poles, are used in whole or in part for wire communications. To the extent those facilities are voluntarily offered and used for wire communications and the state has not preempted the FCC's jurisdiction, the

---

1/ 47 U.S.C. § 224.

2/ Pub. L. No. 104-104, 110 Stat. 156, to be codified at 47 U.S.C. §§ 151 et seq.

3/ 47 U.S.C. § 224(e)(1).

4/ A general description of each of the Infrastructure Owners is attached hereto as Appendix I.

Infrastructure Owners are subject to regulation by the Commission under the Pole Attachments Act.[5/]

Because of the complexity of the pole attachment rate issues and the enormous demands the Commission is facing in implementing the 1996 Act within the statute's prescribed deadlines, the Infrastructure Owners have developed this position paper as a means of assisting the Commission in its decision making on pole attachment-related issues. The Infrastructure Owners' goal in developing this position paper is to assist the Commission in addressing certain detailed issues that arise in the rate context. The Infrastructure Owners also seek to assist the Commission in constructing a pole attachment rate formula that achieves an equitable balance between the interests of utility pole owners and those of telecommunications carriers who seek access to utility poles, consistent with the statutory mandate of just, reasonable, and nondiscriminatory rates.

As a preliminary matter, however, the Infrastructure Owners note that a number of electric utilities, including some who assisted in the development of this position paper, have filed suit in the federal district court in Pensacola, Florida challenging the constitutional validity of the nondiscriminatory access provisions of Section 224(f) of the Pole Attachments Act.[6/] By presenting this position paper, the Infrastructure Owners are not requesting that the Commission consider or address the constitutional issues raised by the Pole Attachments Act. Moreover, the comments expressed in this paper are not intended to, and should not be construed to, suggest that the nondiscriminatory access provisions of the Pole Attachments Act are constitutional or that any rate developed pursuant to that statute constitutes "just compensation" in a constitutional sense. The Infrastructure Owners expressly reserve any legal, equitable or constitutional rights, including but not limited to the rights arising under the Fifth Amendment of the Constitution, not to have their property taken without just compensation. Thus, the Infrastructure Owners reserve any and all legal and equitable relief that may be available to them in a court of law or equity.

[5/] Some of the Infrastructure Owners provide energy service in States that have preempted the Commission's jurisdiction under Section 224 by making the certification required by 47 U.S.C. § 224(c)(2), and are therefore subject to state regulation of pole attachments. Nonetheless, because the federal statute serves as a loose "benchmark" on pole attachment and related issues, all of the Infrastructure Owners have a significant interest in the Commission's actions concerning such issues.

[6/] Gulf Power Co. et al. v. United States, C.A. No. 3:96 CV 381 (N.D. Fla.).

II. JUST, REASONABLE, AND NONDISCRIMINATORY RATES

A. Voluntarily Negotiated Agreements Should Be Encouraged

Section 224(e)(1) requires the Commission to develop regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, "when the parties fail to resolve a dispute over such charges."[7/] This language supports the principle that a voluntarily negotiated rate should be the fundamental means of setting rates for distribution pole access; the statutory rate should only be employed as a last resort. The principle of a negotiated rate is consistent with the Congressional intent of Section 224(e), the overall policies underlying the 1996 Act, and the Commission's ongoing approach to the implementation of the 1996 Act.

First, the Congressional intent to encourage negotiated pole attachment agreements, including negotiated rates, is clear. In its explanation of the amendments to the Pole Attachments Act, the Conference Committee reporting the telecommunications legislation to the Congress stated:

> The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms and conditions for attaching to poles, ducts, conduits and rights-of-way owned or controlled by utilities.[8/]

The relevant statutory language providing for negotiations was adopted unchanged from the Conference Report. Thus, the legislative history serves as explicit evidence that Congress intended negotiations to play the key role in determining a rate for pole attachments. Deregulation and competition are the themes of the 1996 Act. Those themes are apparent in the rate-setting provisions of the Pole Attachments Act.

Second, a negotiated pole attachment rate also comports with the public policies underlying the 1996 Act. The Act is intended "to provide for a pro-competitive, de-regulatory national policy framework . . . by opening all telecommunications markets to competition.[9/] The Senate, in crafting its version of the telecommunications legislation stated that "[c]ompetition, not regulation, is the best way to spur innovations and the development of new services. A competitive market place is the

---

7/ 47 U.S.C. § 224(e)(1) (emphasis added).

8/ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207 (1996) (emphasis added).

9/ H.R. Conf. Rep. No. 458, 104 Cong., 2d Sess. 113 (1996).

most efficient way to lower prices and increase value for consumers."[10] Similarly, the House of Representatives styled its legislation as a bill "[t]o promote competition and reduce regulation."[11] Thus, even where Congress recognized that some regulation might be warranted during a transition period from a regulated to a deregulated market place, it put in place procedures to reduce or eliminate that regulation where possible.[12]

Finally, the Commission's own implementation of the 1996 Act confirms the important role of voluntarily negotiated agreements. For example, although the Commission determined in its Interconnection decision[13] that nondiscriminatory access to poles, ducts, conduits and rights-of-way is required, the Commission declined to establish a "comprehensive regime of specific rules, but instead establish[ed] a few rules supplemented by certain guidelines and presumptions that ... will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements."[14]

In short, negotiations should be the prevailing means of determining a rate for access by telecommunications carriers to the infrastructure owned by utilities. "Good faith" negotiations aimed at reaching a pro-competitive agreement over the rates, terms and conditions upon which pole attachments can be made, rather than a demand for an artificial, regulated rate, is consistent with Congress' intent and the statutory scheme. Congress recognized the important role of an open and competitive market in Section 224(e) and thus provided that a government-imposed rate should come into play only as a fall-back. Any rate regulations the Commission may issue must honor the Congressional intent -- the important role of negotiations -- embodied in the statutory scheme.

Finally, a voluntarily negotiated pole attachment agreement must be binding on the parties, just as a voluntarily negotiated interconnection agreement under Section 252(a)(2) is binding on the parties. The rates, terms and conditions of contracts

---

[10] S.652, Sec. 5(1).

[11] See, H.R. 1515.

[12] See, e.g., 47 U.S.C. § 252(a)(1) (providing that an incumbent local exchange carrier and a party requesting interconnection may enter into a binding agreement without regard to the interconnection standards set forth in Sections 251(b) and (c)).

[13] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (released August 8, 1996)("the Interconnection Order").

[14] Order at ¶ 1143.

voluntarily entered into must be deemed binding and enforceable, even if those terms and conditions depart from prior FCC precedent. If not, the ability to contract at all, and Congress' emphasis on a deregulated, not a regulated marketplace, is meaningless.

B. The Regulated Pole Attachment Rate Methodology

The FCC's current pole attachment rate methodology involves a series of calculations addressing the net cost of a bare pole, carrying charges components (including administrative, maintenance, depreciation, taxes and cost of capital) and a use ratio. Certain basics and assumptions were formulated some eighteen years ago. The formula has been revised in some respects over the intervening years.

Below, the Infrastructure Owners provide comment on the major aspects of the FCC's rate methodology for distribution poles. First, the Infrastructure Owners review the assumptions used by the Commission over the years and suggest changes to update those assumptions in accordance with prevailing practices in the industry. Second, the Infrastructure Owners propose a method for calculating rates that assume an average number of parties per pole, as a substitute for a pole-by-pole assessment and rate calculation. Third, changes in the calculation of the typical pole height and the average amount of usable and other than usable pole space are discussed, again in light of current practices. Fourth, the Infrastructure Owners suggest changes in the method of calculating the net cost of a bare pole, in an attempt to produce a figure that more accurately reflects actual costs. Finally, the Infrastructure Owners address the carrying charges component of the rate formula and, again, suggest changes that will result in a more precise calculation of actual costs.

1. The Rate Formula Must Continue to Be Based on Reasonable, Rebuttable Presumptions

Section 224(e)(1) of the Pole Attachments Act requires the FCC to promulgate regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, in the event parties are unable to reach a voluntarily negotiated rate for such pole attachments.[15/] Specifically, the Pole Attachments Act requires a utility to:

(1) Apportion the cost of the other than usable space among entities so that the apportionment equals two-thirds of the costs of the other than usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities; and,

---

15/ 47 U.S.C. § 224(e)(1).

(2) Apportion the costs of providing usable space among all entities according to the percentage of usable space required for each entity.

At a minimum, the implementation of the two-part statutory scheme on a pole-by-pole basis requires knowledge of the number of parties on each and every utility pole, the pole height, the amount of space occupied by each attaching entity, the amount of other than usable space and the amount of usable space. Pole-by-pole information of this type is not maintained by the Infrastructure Owners, because it does not have a value to the Infrastructure Owners' core electric business or to their core constituents -- the consumers of electric power. To the best of the Infrastructure Owners' knowledge, a pole-by-pole accounting of this nature is not a prevailing practice in the industry.

The creation of a database to collect and maintain pole-by-pole information will be a time-consuming and costly venture. The implementation and maintenance of such a database would require, at a minimum, the following:

- The purchase and maintenance of computer hardware;
- The development, purchase and maintenance of computer software;
- The collection of information by surveying (i.e., the physical counting of infrastructure);
- The hiring of data entry personnel and the performance of data entry;
- The maintenance of the database through an ongoing program to update information (including periodic surveying);
- The training of employees in gathering the necessary data, maintaining the database, calculating the applicable pole attachment rates, and in billing and collection matters; and
- The design and implementation of new billing and collection procedures.

In the Infrastructure Owners' view, the development of a pole database to establish the number of attaching entities on each pole, the pole height, the amount of space occupied by each attaching entity, the amount of other than usable space and the amount of usable space is impractical. The costs to implement and maintain the database would be significant. Although the Infrastructure Owners have not undertaken a formal study of those costs, they estimate that the upfront costs would run into millions of dollars. The maintenance of the database would, of course, mean

ongoing, significant maintenance costs. Implementation of the database would take years.

Because the sole beneficiaries of a pole-by-pole database are parties seeking to attach to utilities' poles, the costs of the database would have to be borne by attaching entities -- telecommunications carriers and cable operators. Neither the utilities nor their ratepayers can be expected to absorb these costs. To pay for the initial development of the database, telecommunications carriers and cable operators would have to be assessed an upfront fee. Thereafter, database maintenance costs would have to be assessed on a periodic basis.

Apart from the cost issue, the Infrastructure Owners question whether a pole-by-pole database results in any benefit to telecommunications providers or cable operators. Certainly, there is no apparent benefit to the consumers of telecommunications or cable television services. Thus, in lieu of requiring the development of a costly database that yields no benefits to the consumers of electric power or the subscribers of telecommunications and cable television services, the Infrastructure Owners encourage the Commission to continue to permit averages and assumptions to be used.

The use of averages and assumptions has been sanctioned by the Commission throughout its regulation of pole attachments.[16/] For example, in its initial 1978 order, the Commission provided for the averaging of the amount of usable space on a pole.[17/] The Commission's rationale in permitting averaging, in this context and elsewhere in its decisions, is that averaging avoids unnecessary disputes between parties over actual figures that may be difficult to ascertain and "will better serve Congress' intent that the Commission develop 'a flexible program . . . [that is] simple and expeditious.'"[18/]

The Infrastructure Owners urge the Commission to continue the practice of allowing an average or assumption to be used. By so doing, the Commission will continue to promote an expeditious and cost-effective method of calculating pole attachment rates that benefits all interested parties and the consumers of their respective services.

16/ See, e.g., In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C. 2d 1585 (1978).

17/ Id. at 1604.

18/ In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 72 F.C.C. 2d 59, 69 (1979) ("Second Report and Order") (quoting S. Rep. No. 95-580, 95th Cong., 1st Sess. 21-22 (1977)).

2. The Calculation of the Average Number of Parties Per Pole

The calculation of each attaching entity's share of the costs of the other than usable space requires that the utility have knowledge of the number of parties with pole attachments on each pole. As noted above, in lieu of a pole-by-pole calculation, the Infrastructure Owners recommend the use of currently available, accurate information to calculate the average number of parties with pole attachments per pole.

The Infrastructure Owners recommend that the following calculation be performed to yield the average number of parties per pole over a utility's distribution system:

> The average number of attaching entities per pole (assuming that multiple attachments on a pole by a single entity as part of the same system are considered as one attachment) =

$$\frac{\text{The Total Number of Attachments of Telecommunications Carriers, Cable Operators and Incumbent LECs}}{\text{The Total Number of Poles - Poles of 30' and Less}^{19/}}$$

The Infrastructure Owners' proposed calculation of the average number of attaching entities per pole utilizes information that is presently collected and maintained by utilities. Most utilities collect and maintain information -- through the pole permitting process and through the billing and collection process -- on the total number of pole attachments on their poles and the identity or status of the attaching entity (e.g., telecommunications carrier, cable operator, incumbent LEC). Thus, they have readily available information that will yield the total number of pole attachments that are subject to the Pole Attachments Act. Attachments by parties that are not subject to the Pole Attachments Act -- for example, attachments made by governmental agencies as a public service accommodation by the utility and at no cost to the agency involved -- should not be included in the calculation of the average number of attachments per pole because it would unfairly reduce the percentage of costs recovered by the utility for the other than usable space. Congress intended in the new rate formula for utilities to recoup the costs of the non-usable space.[20/]

[19/] As discussed below, the Infrastructure Owners recommend that poles 30 feet and less in height should be excluded from the pole count because they are not sufficiently tall to be used for attachments by multiple parties.

[20/] See, e.g., H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207 (1996) ("New (continued...)

Incumbent LECs are included in the calculation of the average number of parties per pole. Although not entitled to make pole attachments to utilities' poles at the statutory rate, the exclusion of incumbent LECs from the rate calculation would have the inequitable effect of increasing the percentage of the costs of other than usable space borne by telecommunications carriers and cable operators. Clearly, incumbent LECs do occupy utility poles in many instances and, unlike the parties the Infrastructure Owners propose to exclude from the calculation (governmental agencies who do not pay a fee for the use of the space), the incumbent LECs do pay a fee for the use of utilities' poles. For this reason, the Infrastructure Owners suggest that they should be included in the calculation of the average number of parties per pole.

Finally, utilities maintain accounting records of the total number of poles in service over their distribution system. The Infrastructure Owners propose that the total number of poles reflect only distribution poles of 35 feet or taller. Quite simply, distribution poles of 30 feet and less cannot be used by multiple parties because they are not sufficiently tall; typically will only accommodate the facilities of the electric utility and are not representative of a typical distribution pole. Moreover, many poles of 30 feet or less are used strictly for street lights and, therefore, are not applicable for joint use.

The Infrastructure Owners' proposed averaging of the number of parties per pole, to be calculated on a utility-by-utility basis, using actual figures to calculate an average. The averaging of the number of parties with pole attachments on a pole will not have a material impact on attaching entities.

3. The Calculation of the Typical Pole Height and the Amount of Usable and Other Than Usable Pole Space

In the rulemaking proceedings to implement the pole attachment rate formula set forth in the original 1978 Pole Attachments Act, the Commission invited comments on the amount of usable space for various sizes of poles in different service areas.[21/] Based on the comments submitted to it, the Commission found that "the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 and 16 feet, respectively."[22/] To simplify the process and avoid a pole-by-pole rate calculation, the Commission permitted utilities the option of using the arithmetic average of the

---

[20/](...continued)
subsection 224(e) establishes a new rate formula charged to telecommunications carriers for the non-useable [sic] space of each pole.").

[21/] Second Report and Order, 72 F.C.C. 2d at 68.

[22/] Id. at 69.

usable spaces of 11 and 16 feet, that is, 13.5 feet, as the amount of usable space per pole for those poles used for cable attachments.[23/] The use of 13.5 as the average amount of usable space resulted in a hypothetical pole height of 37.5 feet. The Infrastructure Owners support the use of an average pole height and average amounts of usable and other than usable space. They believe, however, that the averages have changed over time and, therefore, support the Commission's review and revision of those averages.

The Infrastructure Owners believe that an average pole height of between 35 feet and 40 feet is no longer accurate. Over time, in light of the growing demand for access to poles by cable operators and others, 35 foot poles have been replaced with 40 foot and taller poles, to accommodate the demand for space. Although 45 foot or taller poles are in service, the Infrastructure Owners believe that, on average, the pole height of poles used for cable operators and other attachees is 40 feet. The Infrastructure Owners urge the adoption of a 40 foot pole as the average pole height.[24/]

Assuming a typical pole height of 40 feet, the Infrastructure Owners calculate the amount of usable space and other than usable space as follows:

(1) The average amount of usable space, and the average amount of space required for each type of entity, is as follows:

- 11 feet of usable space with electric occupying 7.5 feet, cable occupying 1 foot, and the LEC occupying 2.5 feet.

(2) The average amount of other than usable space is 29 feet with the following allocation:

- 6 feet below ground;
- 19.8 feet of minimum ground clearance;
- 40 inches of clearance between the electric and communications space.

The calculation of the average amount of usable space is derived from the calculation of the average amount of other than -- or nonusable -- space. Turning to

---

[23/] Id.

[24/] Poles are available only in 5 foot increments. Thus, the use of a 40 foot average pole height also dispenses with the hypothetical pole of 37.5 feet.

that calculation, the Infrastructure Owners believe that the amount of space below ground is not an issue. The Commission has recognized that 6 feet of pole space underground (for a 35 foot pole) is standard.[25/]

The Commission also has previously recognized that 18 feet of pole space on any pole must be reserved for ground clearance pursuant to the National Electrical Safety Code ("NESC").[26/] What the Commission has not previously recognized, however, is that 18 feet of ground clearance at mid-span requires that the lowest attachment on a pole be at least 19.8 feet from the ground to accommodate for cable sag. Stated alternatively, to achieve a minimum ground clearance of 18 feet, a pole attachment cannot be made lower than 19.8 feet from ground. The Infrastructure Owners urge the Commission to recognize the actual specifications required for compliance with safety standards and to adopt a minimum ground clearance of 19.8 feet at the pole.

With respect to the 40 inch clearance or safety space that is required under the NESC to be maintained between power lines and communications cables, the Commission has previously found that under the 1978 rate formula, the 40 inches cannot be included in the calculation of the usable space, a percentage of which must be shared by cable television operators based on the amount of space occupied by them.[27/] The Infrastructure Owners concur. However, the 1996 Act's amendments to the Pole Attachments Act now require all attaching entities to share in the costs of the nonusable space.

The 40 inch clearance is designed to protect the employees of communications companies from coming into physical contact with the potentially fatal voltage carried by the electric lines. As such, the Commission has previously held that the risk for maintaining this safety space effectively falls on the cable operator.[28/] While the clearance is intended to benefit primarily communications company workers, the Infrastructure Owners recognize that all parties benefit from the 40 inch clearance space. For this reason, consistent with the Congressional intent, the Infrastructure Owners support the assignment of the 40 inch clearance space as other than usable space, the costs of which will be shared by all parties with pole attachments.

[25/] Second Report and Order, 72 F.C.C. 2d at 68 n.21.

[26/] Id. Ground clearance of 18 feet also is required by local standards in many areas.

[27/] Second Report and Order, 72 F.C.C. 2d at 70-71.

[28/] Id. at 71.

The calculation of the amount of other than usable space results in a calculation of 11 feet of usable space on a 40 foot pole. This figure is consistent with the current allocation of usable space on the pole.[29/]

The Infrastructure Owners encourage the Commission to continue the practice of permitting pole rate calculations based on averages. In accordance with that practice, the Infrastructure Owners submit that the average pole height is 40 feet, the average amount of usable space is 11 feet on a 40 foot pole, and the average amount of other than usable space is 29 feet on that same pole. While continuing to promote a streamlined and expeditious calculation of pole attachment rates, the Commission's adoption of these revised averages will reflect the more accurate, actual usages of the pole space by the respective parties that have evolved over time. During the 18-odd years since the enactment of the 1978 statute, assumptions, prevailing practices in the industry, and usages have changed. Accordingly, a more equitable sharing of the costs of providing and maintaining the infrastructure is needed and should result from the proposals set forth by the Infrastructure Owners.

4. The Calculation of the Net Cost of a Bare Pole

Under the Commission's current rate formula, the calculation of the net cost of a bare pole is as follows:

$$\frac{\text{A/C 364 (Gross Pole Investment) - Depreciation Reserve (Poles) - Accumulated Deferred Income Taxes (Poles)}^{30/} - .15 \text{ of Net Pole Investment}^{31/}}{\text{Number of Poles}}$$

29/ The Commission has assumed that cable operators occupy one foot of usable space on the pole. See, Second Report and Order, 72 F.C.C. 2d at 70. On average electric facilities occupy between 7-8 feet of usable space and LEC facilities occupy between 2-3 feet of usable space. The Infrastructure Owners have averaged the amount to space occupied by each to arrive at an assignment of 7.5 feet of usable space for electric and 2.5 feet of usable space for LEC facilities.

30/ In this calculation of the net cost of a bare pole, the Infrastructure Owners treat deferred taxes as some state commissions do -- as a rate base deduction. If the state utility commission includes the reserve for deferred income taxes in the utility's capital structure at zero cost, this adjustment to A/C 364 would not be necessary.

31/ See Footnote 30 regarding the deduction of accumulated deferred income taxes.

Overall, the Infrastructure Owners agree with the methodology used by the Commission to calculate the net cost of a bare pole.[32] They do, however, recommend two changes that will result in a more accurate calculation.

First, as noted above, the Infrastructure Owners propose that poles of 30 feet in height and less should be eliminated from the investment in Account 364 and from the total number of poles to arrive at a more accurate accounting of the actual net costs of a bare pole and a more precise count of the actual number of poles suitable for joint use, where the information necessary to do so is readily available to the utility. Poles of 30 foot or less simply do not have sufficient usable space to accommodate attachments by any party other than the electric utility.[33] For this reason, their inclusion in both the numerator and denominator of the calculation results in an inexact determination of the actual net costs of a bare joint use pole.

The deduction of poles of 30 feet or less from Account 364 and from the total number of poles does not involve the collection of new or difficult-to-gather information. On the contrary, in most cases, the information is readily available and is easily identifiable by electric utilities. In light of the ease with which the information can be identified and the value of a more accurate calculation, the Infrastructure Owners urge the Commission to adopt this approach.[34]

---

[32] As a preliminary matter, the Infrastructure Owners submit that, in general, the costs used to calculate the applicable pole attachment rate should be replacement or market value costs, not embedded costs. The use of market-value or replacement costs, in lieu of historical costs, should be a key aspect of the FCC's upcoming rate rulemaking. Nonetheless, because the Commission has historically used embedded costs in its calculations, the comments here continue to use the FERC Form 1 Accounts (which are based on embedded costs). An updated reference to those accounts is attached hereto as Appendix II.

[33] Poles of 30' and less can be used for service drops. However, the assumptions concerning usable and other than usable space and the percentages assigned to parties would not follow the current rate methodology. Thus, the Infrastructure Owners submit that, at a minimum, a separate rate methodology would need to be developed.

[34] The Infrastructure Owners urge the deduction of poles of 30 feet and less from the calculation of the net costs of a bare pole, but they do not seek a similar deduction in the carrying charges component of the rate calculation, discussed below. The quantity of and investment in poles of 30 feet or less can be readily identified in Account 364. Thus, in offsetting Account 364 in the numerator of the calculation, a correlating offset is made in the denominator. Thus, there is no double counting and the underlying data is not skewed. Similar offsets cannot be easily performed with

(continued...)

Second, portions of Accounts 365 and 368 should be included in the numerator component of the calculation of the net cost of a bare pole. Account 365 includes the installed cost of grounding installations and lightning arresters used for distribution purposes.[35/] The cost installed of lightning arresters attached to line transformers is included in Account 368.[36/]

Section 9 and 21 of the NESC states that all messenger wires and guys (including those used for CATV and telecommunications) are required to be grounded at poles. Grounds for attachment at poles and lightning arresters to protect pole attachments are provided by the electric utility as a pole owner. They are accounted for in Accounts 365 and 368. Cable operators and telecommunications companies use these pole bonds for protection of their equipment and for compliance with Section 9 (92C1, 2, and 3) and Section 21 (215C1) of the NESC. Any joint user with metallic cables benefits from the utility's ground wires because it must bond from its sheath to the ground to minimize potential differences in circulating currents. Joint users also benefit from the utility's lightning arresters since they provide protection from voltage surges for both facilities. Tree trimming is another clear benefit. These costs are currently borne solely by the electric utility; they are not presently included the FCC's pole attachment rate formula.

In sum, the facilities included in Accounts 365 and 368 are essential grounding facilities that are used by and useful to cable television operators and telecommunications carriers. Grounding installations, lightning arresters, initial tree trimming and clearing, and power supplies are an important element of the gross investment in poles and are directly related to protection of attaching entities' equipment. For this reason, to more accurately reflect the true costs, the Infrastructure Owners support the inclusion of an appropriate percentage (i.e., in the range of 10-12% and 4-6% respectively) of Accounts 365 and 368, respectively, in the calculation of the net cost of a bare pole.[37/]

[34/](...continued)
respect to the carrying charges calculations. Thus, inequities would result in reducing the investment in Account 364 by the deduction of poles of 30 feet and less without reducing the associated maintenance, administrative, tax and depreciation expenses.

[35/] See 18 C.F.R. Part 101 (1996).

[36/] Id.

[37/] Depreciation reserve and accumulated deferred income taxes would, of course, be deducted from Accounts 365 and 368, as they currently are deducted from Account 364.

5. The Calculation of Carrying Charges

The Commission's calculation of the carrying charges component of the current pole attachment rate formula involves several elements: (1) administrative expenses; (2) maintenance expenses; (3) depreciation expenses; (4) normalized taxes; and, (5) the cost of capital. The Commission has issued decisions establishing the specific manner in which the carrying charges elements should be calculated.[38/]

In this position paper, the Infrastructure Owners do not address the Commission's methodology regarding the administrative, depreciation, and costs of capital elements of the carrying charges component. They suggest one change in the manner in which the maintenance expense element is calculated, the addition of a new element to reflect operations expenses, and a possible revised formula for the taxes expense element.

Maintenance expenses are currently calculated as follows:

A/C 593 (Maintenance of Overhead Lines)
A/Cs 364 (Poles, Towers and Fixtures),
365 (Overhead Conductors) and 369 (Services) -
Depreciation Reserve for A/Cs 364, 365, 369 -
Accumulated Deferred Income Taxes for A/Cs 364, 365, 369

The Infrastructure Owners suggest that the maintenance expense does not reflect the actual costs of maintaining poles, towers and fixtures because it omits the supervision and engineering aspects of the maintenance function. For this reason, the maintenance element should be revised as follows:

$$\text{Maintenance Expense} = \frac{\text{A/Cs 590 (Maintenance supervision and engineering) + 593}}{\text{A/Cs 364, 365, 369 - Depreciation Reserve for A/Cs 364, 365, 369 - Accumulated Deferred Income Taxes for A/Cs 364, 365, 369}}$$

Account 590 includes the cost of labor and expenses incurred in the general supervision and direction of maintenance of the distribution system.[39/] The expenses

---

[38/] In the Matter of Amendment of Rules and Policies Government the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 (1987); see also In the Matter of Amendment of Rules and Policies Government the Attachment of Cable Television Hardware to Utility Poles, 4 FCC Rcd 468 (1989).

[39/] 18 C.F.R. Part 101.

are not currently included in the maintenance calculation and are not recovered elsewhere in the pole attachment rate calculation. Because the Account 590 maintenance expenses are directly attributable to the function of maintaining the pole distribution network that, in turn, directly benefits parties with pole attachments, those expenses should properly be included in the rate calculation.

The Infrastructure Owners also recommend the adoption of a new element of the carrying charges component to capture the operations costs of the distribution network and its pole attachments. The following operations expense formula is proposed:

$$\text{Operations Expense} = \frac{\text{A/Cs 580 (Operation supervision and engineering) + 583 (Overhead line expenses) + 588 (Miscellaneous distribution expenses)}}{\text{A/Cs 364, 365, 368[40], 369 - Depreciation Reserve for A/Cs 364, 365, 368, 369 - Accumulated Deferred Income Taxes for A/Cs 364, 365, 368, 369}}$$

The supervision and engineering expenses of Account 580, like the companion Account 590, include the costs of labor and expenses incurred in the general supervision and direction of the operation of the distribution system.[41] Account 583 includes major overhead line expenses.[42] Finally, Account 588 includes the costs of labor, materials used and expenses incurred in distribution system operations not provided for elsewhere.[43] Those items include, but are not limited to, joint pole maps and records and operating records covering poles, transformers, manholes, cables and other distribution facilities (excluding meter records, etc.).[44]

Like the Account 590 expenses, these items are directly related to the operation of the distribution system and its pole attachments. They have a direct benefit to parties with pole attachments on utility poles, but they are not currently recovered through the pole attachment rate formula. The Infrastructure Owners suggest that they

---

[40] The Infrastructure Owners submit that Account 368 is properly associated with Accounts 580, 583 and 588 and should be included in the denominator with Accounts 364, 365, and 369.

[41] Id.

[42] Id.

[43] Id.

[44] Id.

properly should be and urge the Commission to revise that formula to include an operations element of the carrying charges component.

Finally, the Infrastructure Owners suggest that a revised tax expense element of the carrying charge should be considered by the Commission in its rate rulemaking. In the Infrastructure Owners' view, the current tax expense calculation should be examined to determine whether it unfairly penalizes those companies with low or no earnings in any given year.

III. OTHER JUST, REASONABLE AND NONDISCRIMINATORY TERMS AND CONDITIONS OF POLE ATTACHMENTS

A. Attachment Permitting and Preapproval Is Mandated by Safety and Reliability Concerns

The attachment of telecommunications and cable television facilities to the poles of electric utilities necessarily raises safety and reliability concerns. Care must be taken to ensure that the required clearances are maintained, that personnel are properly trained in maneuvering around and avoiding contact with electrical wires, and that the pole attachment will not compromise the structural integrity of the pole. Engineering studies must be performed to account for wind loading, ice loading (where appropriate), and guying and anchoring, among other matters. In short, the process is not automatic; it requires a careful consideration of many factors.

To ensure that pole attachments comport with safety, reliability and engineering concerns, the prevailing practice in the industry is to require parties seeking to attach to a utility's poles to apply for a notification permit to attach and to obtain the utility's preapproval before the attachment of facilities actually occurs. Pole attachment agreements generally provide for permitting and preapproval of applications for attachment to specific utility poles. In theory, the contractual obligation should prevent unauthorized attachments. In practice, it does not.

Utility surveys of distribution pole systems routinely reveal significant numbers of unauthorized attachments. For example, the Infrastructure Owners report that during any given pole inspection, roughly 10-15% of the poles contained attachments by telecommunications companies that were unauthorized. The approximate number of unauthorized attachments by cable operators is generally higher, in the range of 20-22%. The unauthorized attachments typically represent an attempt by the attaching entity to avoid the pole attachment rate charges or to avoid addressing a safety code violation. Either motive is problematic, but the safety concerns are of greatest significance.

Unauthorized attachments will become increasingly problematic over time, with increases in demands for access to utilities' poles. Unauthorized attachments on poles do not give pole owners the opportunity to make reasonable determinations as to the proper loading and stress on the pole. The inability to perform accurate safety and reliability calculations threatens reliable electric service and, accordingly, the public safety (since police, fire, and other emergency and public safety services rely on electric service in the performance of their public safety responsibilities). Unauthorized attachments also may cause personal and property damages and the loss of telecommunications and cable television services. Finally, the "free ride" enjoyed by parties who make unauthorized attachments to utilities' poles results in higher pole attachment rates for all other attaching entities.

The Infrastructure Owners urge the Commission to adopt, in the course of its rate rulemaking proceeding, a regulation requiring parties seeking access to utilities' poles to obtain an upfront permit and the utilities' preapproval to attach. That regulation should find that a contractual provision requiring a party seeking to attach to a utility's poles to obtain a permit to do so, and preapproval from the utility prior to making any attachment, is a just, reasonable and nondiscriminatory term or condition of a pole attachment agreement. Only by doing so will the Commission ensure that the very real safety and reliability concerns of utilities are met, that the pole on which telecommunications or cable television facilities are to be mounted can withstand that added attachment and that all attaching entities share in the costs of maintaining the structures on which their respective equipment is attached.

With the enactment of the 1996 Act, the Pole Attachments Act now makes a distinction between the pole attachments of "pure" cable operators and the pole attachments of other telecommunications carriers.[45/] Section 224(d) establishes the current FCC rate as the pole attachment rate applicable to "any pole attachment used by a cable television system solely to provide cable service."[46/] Section 224(e), on the other hand, establishes the rate applicable to pole attachments by telecommunications carriers to provide telecommunications services.[47/] The new rate for telecommunications carriers and cable operators providing both cable and telecommunications services takes effect five years after the date of enactment of the 1996 Act (i.e., February 8, 2001).

Because cable operators providing "pure" cable services over their entire system will be indefinitely grandfathered at the current, low FCC rate, a potential for

---

45/ 47 U.S.C. §§ 224(d) and (e).

46/ 47 U.S.C. § 224(d)(3).

47/ 47 U.S.C. § 224(e)(1).

abuse exists.[48] Unless the Commission requires "pure" cable operators to make a certification, upon penalty of perjury, that their respective system is used solely to provide traditional one-way video programming services to subscribers over their entire system, cable operators providing two-way and other telecommunications services will gain an unfair competitive advantage over other non-cable providers of telecommunications services. Further, the "free rider" situation will again be present, where a cable operator does not pay its fair share of the costs of the pole and, therefore, receives a subsidy from other attaching entities. As noted above, Congress intended a level playing field.

To prevent the "free rider" situation, the Infrastructure Owners support the adoption of certification procedures by those parties claiming to provide "pure" cable services. As part of the permitting and preapproval process, such operators should be required to make a certification (under penalty of perjury) to the utility that its system provides only "pure" cable television services. Unless the required certification is made, the utility must be entitled to presume that the attachments provide both one-way and two-way telecommunications services and to assess the pole attachment rate applicable to telecommunications carriers.[49] Moreover, a cable operator must be required to inform a utility with whom it has pole attachments if the nature of its services changes -- that is, from "pure" cable television services to "mixed" services or vice versa -- within 60 days of the change.

Finally, all attaching entities have an equal interest in ensuring that all other parties with pole attachments pay their fair share of the pole costs, according to the statutory scheme enacted by Congress. For this reason, enforcement of the permitting/preapproval and cable operator certification requirements should lie with the FCC through a complaint proceeding.

B. The Identification of Facilities Is Essential

In addition to requiring parties to obtain a permit and the authorization or preapproval of the utility to make a pole attachment, the Infrastructure Owners also

---

[48] The Commission found in its Interconnection Order that a utility that uses any single part of its infrastructure to provide wire communications triggers access to all of the utility's infrastructure under the Pole Attachments Act, even that infrastructure not currently used for wire communications. Interconnection Order at ¶ 1173. Similarly, the Commission must find that the provision of any telecommunications services anywhere over a cable operator's system taints the entire system. Accordingly, in that situation, the cable operator is no longer entitled to pole attachments at the current, artificially low rate.

[49] See 47 U.S.C. § 224(e).

urge the Commission to require attaching parties to clearly identify their attachments through a standardized, nationwide identification process. An identification requirement, like the permit and preapproval requirement, is necessitated by public safety concerns.

Many utility poles currently contain multiple attachments. Oftentimes, those attachments cannot be identified by visual inspection. Moreover, although there may only be two pole attachments on any given pole -- by the LEC, a cable television operator, or a competitive access provider -- a utility's system of distribution poles may be used by many parties in different localities. For example, Duke Power Company reported that approximately 70 different cable television operators or telecommunications carriers, some with multiple contracts, have pole attachments on its infrastructure in its two-state service territory (North and South Carolina). American Electric Power Service Corp. deals with 256 CATV and telecommunications providers in its 7 state territory. Duke Power's and American Electric Power Service Corp.'s situations are not atypical. In light of these kinds of numbers and because many utilities do not maintain a database of pole-by-pole information, it is virtually impossible to identify a particular party's facilities.

In emergency situations, utility pole owners must be able to identify the owners of facilities that are attached to their infrastructure. Without that information, they cannot contact the owner of the facilities to inform it that a pole, and thus its cables and other facilities that might be owned by the telecommunication service provider, are down. Contact about routine operations and maintenance is difficult as well and often results in additional field work to trace a cable to an identified source.

The most efficient and reliable way of resolving this problem is to require a party seeking access to a utility's poles to identify its facilities when it makes its attachment and to update that information as necessary. A nationwide, standardized system should be developed so that facilities can be easily identified and to account for overlapping distribution territories. The name of the company, its location, and 24-hour telephone number (an 800 or other toll free number), and any other telephone number to be used in the event of an emergency, should be sufficient information to address utilities' safety concerns. Without that information the Commission should find that utilities are relieved of their obligation to provide the telecommunications carrier or cable operator with written notice of scheduled modifications to the facilities pursuant to Section 224(h) or to otherwise assume any liability for the facilities of those providers.

The Infrastructure Owners recommend that the Commission seek comments and reply comments in its upcoming pole attachment rate rulemaking on the most efficient, and least costly but reliable, method of properly identifying pole attachments and related facilities. Alternatively, the Commission might consider a negotiated